

NTSB Order No. EA-3951

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 28th day of July, 1993

Docket No. 108-EAJA-  
SE-10353

Applicant has appealed the initial decision issued by Administrative Law Judge Jerrell R. Davis on June 17, 1991. The law judge denied an application, filed under the Equal Access to Justice Act (5 U.S.C. 504, "EAJA"), for agent's fees and expenses in connection with applicant's defense of an order issued by the Administrator.<sup>1</sup> We grant the appeal and the EAJA application.

Applicant (termed respondent in the proceeding on the merits) was the pilot-in-command of a Cessna 402B on April 21, 1989. Applicant was taxiing the aircraft when he was stopped by his employer's local chief pilot, Steve Henley. Mr. Henley had been advised by an FAA inspector at the scene, Mr. David Luehring, that the aircraft's rudder was contaminated with bird nesting material.<sup>2</sup> The Administrator alleged that applicant was taxiing for the purpose of flight, that the nesting material made the aircraft unairworthy, and that applicant's actions were careless, in violation of 14 C.F.R. 91.29(a) and 91.9.<sup>3</sup>

After a hearing, the law judge affirmed the Administrator's allegations. Applicant appealed. Soon after, the Administrator withdrew the complaint. We held (Administrator v. Nicolai, NTSB Orders EA-3221 and 3279) that applicant's appeal was moot, and dismissed it. Thus, we have not had the occasion to address the law judge's decision on the merits and his conclusions of law have no precedential effect.

Applicant then filed his EAJA application. It was denied by the law judge, who found that applicant had not been a prevailing party before him, and that the Administrator was substantially

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<sup>2</sup>Inspector Luehring believed that the material was a mynah bird's nest. Tr. at 55.

<sup>3</sup>Section 91.29(a) provides that no person may operate a civil aircraft unless it is in an airworthy condition. Section 91.9 (now 91.13(a)) provided that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another. In his reply (at 25), the Administrator states that the § 91.9 allegation was residual to the § 91.29(a) claim.

justified in his prosecution. On appeal, applicant argues that he was a prevailing party, that the Administrator was not substantially justified, and that the law judge erred in various other respects. Because we find that applicant was a prevailing party and that the Administrator was not substantially justified in bringing the airworthiness charge, we need not reach the other issues applicant raises.<sup>4</sup>

Although EAJA does not define "prevailing party," the term requires that the final result represent "in a real sense a disposition that furthers [a fee claimant's] interest." National Coalition Against Misuse of Pesticides v. EPA, 828 F.2d 42, 44 (D.C. Cir. 1987). Here, the Administrator withdrew his complaint after the hearing. In any case, the Administrator admits (Reply at 5) that applicant is a prevailing party for purposes of EAJA, and we will so find.

Our analysis of whether the Administrator was substantially justified requires considerably greater discussion and review of the prior proceedings and the evidence presented at the hearing.

"To find that the Administrator was substantially justified, we must find his position reasonable in fact and law, i.e., the legal theory propounded is reasonable, the facts alleged have a reasonable basis in truth, and the facts alleged will reasonably

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<sup>4</sup>We grant the Administrator's request (Reply at 20) that we strike Addendum D and Section 6 of applicant's brief. This is new evidence, and on a subject (settlement negotiations) we have held will not be considered in our deliberations. We also partially grant the Administrator's motion to strike applicant's reply to the extent that the reply goes beyond permissible reply to the motion to strike. Replies to replies are not permitted.

support the legal theory." Application of US Jet, NTSB Order EA-3817 (1993) at 2, citations omitted. Whether the government wins, loses or, as in this case, withdraws, is not determinative of whether the Administrator was substantially justified in pursuing the matter, as a different analysis is undertaken. Federal Election Com'n v. Rose, 806 F.2d 1081 (D.C. Cir. 1986) and Administrator v. Pando, NTSB Order EA-2868 (1989).

We cannot find that the Administrator was substantially justified in pursuing the § 91.29(a) charge even at the initiation of the investigation. Whether an aircraft is airworthy is a two-part test: the aircraft must be in conformance with its type certificate and in condition for safe flight. Administrator v. Doppes, 5 NTSB 50, 52 (1985). This is a well-established test. Even if nesting material in the rudder takes the aircraft out of conformity with its type certificate,<sup>5</sup> and even if applicant was taxiing for purposes of flight -- two issues critical to the Administrator's case that we do not decide here -- we have been given insufficient basis on which a reasonable person would believe that operating the aircraft in the condition in which the inspector found it would have been unsafe.<sup>6</sup>

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<sup>5</sup>This assumption may not be valid. See Administrator v. Calavaero, Inc., 5 NTSB 1099 and 1105 (1986) (not every defect requires a conclusion that the aircraft does not conform to its type certificate).

<sup>6</sup>Applicant testified that he had seen the bird's nest and that he was taxiing the aircraft over to the hanger to have it looked at by maintenance personnel.

The Administrator's sole evidence regarding the § 91.29(a) airworthiness charge was the testimony of Inspector Luehring. The Administrator is presumed to know the scope of Mr. Luehring's expertise. Yet, this witness was not an airworthiness inspector (Tr. at 51), and did not appear to consider himself an expert on the subject. He testified at the hearing that an airworthiness determination "needs to be made by an airworthiness inspector." Tr. at 142.

More importantly, the thrust of the inspector's testimony at the hearing before the law judge was not that the nest in and of itself made operation of the aircraft unsafe but that it made the airworthiness of the aircraft "unknown." Inspector Luehring further testified to his belief that any foreign object in the rudder made the aircraft "potentially unsafe," which in his mind equalled a finding of unairworthiness. Tr. at 84, 145. The inspector was not especially familiar with manual provisions regarding the balancing of the rudder, did not consult the manual as part of his investigation (Tr. at 142-144) and, on direct examination, offered no technical discussion of these matters. On this particular matter, a more detailed investigation was in order. And, once the hearing began, there was no doubt of the error in the Administrator's position.

Applicant's witness Howell, who was accepted by the law judge as an expert on the airworthiness of the Cessna (Tr. at 373), testified that the issue was not the existence of foreign matter in the rudder, but the balance and weight of that

material.<sup>7</sup> Mr. Howell testified, un rebutted, that up to 10½ pounds can be added to the rudder of this aircraft, provided the weight is properly balanced. Mr. Howell also offered for the law judge's study a mynah bird's nest, to show its minimal (less than 2 ounce) weight. The un rebutted record further indicates that a 2-ounce weight can be added to the rudder within a range of 16 inches of the hinge centerline (10 inches on one side and 6 on the other) with no adverse effect on the aircraft's balance. Tr. at 221-226 and Exhibit R-7 excerpt from Cessna manual.<sup>8</sup> The Administrator offered no information regarding the weight of the nesting material found or its exact positioning. The applicant's contention, therefore, is that the Administrator did not have substantial justification to take the position that the bird nesting material, per se, put the rudder out of balance and, accordingly, that the aircraft was unairworthy.

We must agree. The record reflects a less than thorough investigation and a willingness to prosecute based only on assumptions based on incomplete information. Accord Catskill

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<sup>7</sup>According to his testimony, there are no moving parts in the rudder that could be harmed by mynah birds nesting in it. Inspector Luehring agreed that the issue was balance. Tr. at 83.

<sup>8</sup>Our analysis of substantial justification is separate and different from the question of the Administrator's burden of proof on the merits. And, as noted earlier, we have not adopted the law judge's analysis and decision. Thus, we are not compelled to follow the law judge's stated opinion that Mr. Howell's testimony was "too in[con]clusive to support a finding of airworthiness." Tr. at 374. We further note that this statement would appear to reverse the burden of proof, and that part of the law judge's criticism of applicant's offering (i.e., that it failed to take account of the weight of the nesting material) is equally true of the Administrator's case.

Airways, Inc., 4 NTSB 799 (1983) (EAJA is intended to caution agencies carefully to evaluate their cases). The Administrator did not at any point in his investigation adequately study the rudder balance issues relevant to this aircraft, nor did he make any effort to determine the weight or position of the nesting material (by, for example, taking photos, obtaining the material that was removed from the aircraft, or later by interviewing those who removed it) so that the aircraft's balance could be analyzed. He was also apparently unprepared at the hearing to respond to the detailed testimony of applicant's expert.

The Administrator's later attempt to correct for these lapses -- by arguing that an unknown condition is equivalent to an unairworthy condition and that the aircraft was potentially unsafe -- was directly contrary to established case law requiring that the Administrator prove that operation of the aircraft was actually unsafe.<sup>9</sup> Under these circumstances, the Administrator was not reasonable in pursuing a charge of operating an unairworthy aircraft. And, as the § 91.9 charge was only residual (see note 3), it cannot independently sustain the Administrator's action.<sup>10</sup>

Having found the EAJA application is properly before us, we

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<sup>9</sup>We note that the Administrator does not pursue this argument in his reply to applicant's appeal.

<sup>10</sup>Our finding here is a narrow one. We do not intimate that we would reach the same conclusion if, for example, the § 91.9 carelessness charge was independent rather than residual to the § 91.29(a) claim, or if applicant had been charged with an inadequate preflight inspection.

turn to a discussion of its merits, an issue not addressed by the law judge but one which, given the nature of the Administrator's objections, we can resolve without remand for further proceedings.<sup>11</sup> Applicant has shown his eligibility, has provided explanations of the various charges, the fees sought do not exceed what we are authorized to award either as agent or witness fees and are reasonable.

The Administrator argues, incorrectly, that fees for agents or representatives other than attorneys are not available under EAJA. The statute itself, at 5 U.S.C. 504(b)(1)(A), belies this claim in its definition of fees and other expenses as "reasonable attorney or agent fees . . .", and we have already rejected the arguments made by the Administrator here. See Hampton v. Administrator, NTSB Order EA-3557 (1992) at 7-8. The Administrator next argues that phone, mailing and travel expenses are not authorized. We have rejected this argument as well. Hampton, supra, at note 10. They are legitimate expenses under the statute and are not already incorporated in the representatives' fee structure. In the absence of legitimate challenge, we award applicant the amount sought: \$29,626.04. This represents the amount in the application (\$21,014.54), plus \$3,127 and \$5,484.50 added, respectively, in applicant's May 31, 1991 reply to the Administrator's answer to the application

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<sup>11</sup>In view of the level of actual fees, we also need not seek supplemental pleading to consider a cost-of-living inflator to the fee level in accordance with our recent change to Part 826. See Equal Access to Justice Act Fees, 58 FR 21543 (April 22, 1993).

and in the instant appeal (see Addendum E). See Administrator v. Sottile, 4 NTSB 1217, 1221 (1984) (Board will add to award to cover subsequent expenses, such as appeal). The Administrator entered absolutely no objection to either of the supplemental requests.<sup>12</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's motions to strike are granted as set forth in this opinion;

2. The EAJA application is granted and the initial decision is reversed; and

3. The Administrator is to pay the applicant \$29,626.04.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order. Vice Chairman COUGHLIN submitted the following concurring statement.

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<sup>12</sup>Although this amount appears to us to be excessive, the Administrator's challenges, as shown, offer us no basis on which to reduce it, and we do not see it as our proper role independently to analyze each entry and determine its justification. We would have been amenable to a request that fees be denied for preparation of those pleadings that were unauthorized and rejected. Similarly, the number of hours spent on the instant appeal appears excessive, as it is in some part a repeat of discussion contained in applicant's reply to the Administrator's answer to the application. And, while the Administrator did contend that discovery was too extensive, he did not indicate how he would reduce the requested recovery.

Concurring Statement of Vice Chairman Susan M. Coughlin  
Notation 6056  
Disposition of Applicant's EAJA Appeal

I am compelled to submit a concurring statement in connection with the disposition of applicant Nicolai's appeal to the law judge's denial of his EAJA application.

I take no exception to granting the appeal. The Administrator clearly put on a poorly planned, loosely woven case that deserved reversal. Unfortunately, however, his worst performance was yet to come, when, in answer to Applicant's submittal of an EAJA application, the Administrator argues several irrelevant and incorrect points, while never once questioning the scandalous sum applicant was charged by agents/representatives and experts in his attempt to reclaim expenses from the federal government, a bill ultimately paid by the taxpayer.

I do not argue that, since the Administrator took no exception to the amounts claimed by Applicant, we have no avenue by which to reach the issue of justification of these fees. However, even on casual review these fees seem blatantly excessive. That the Administrator would never question the appropriateness of the level of fees, or at a minimum, ask the Board, should it not uphold the law judge's rejection of the application, to consider reducing the amounts claimed, compounds the insult of this entire proceeding.